

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHONTAY L. SMITH
Claimant

VS.

U.S.D. #233
Self-Insured Respondent

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Docket No. **1,029,822**

ORDER

Self-insured respondent requests review of the December 17, 2008 Award by Administrative Law Judge Steven J. Howard. The Board heard oral argument on March 20, 2009.

APPEARANCES

Keith L. Mark of Mission, Kansas, appeared for the claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that if it is determined that Dr. Vito Carabetta's deposition is part of the evidentiary record the Board should decide the case and not remand it to the Administrative Law Judge (ALJ). And the parties agreed that the Award's compensation paragraph should be modified to reflect claimant suffered a functional impairment and not a work disability.

ISSUES

During the litigation of this case the respondent had filed a motion to extend its terminal date in order to take the deposition of Dr. Carabetta. The ALJ denied respondent's motion for extension of its terminal date. That decision was appealed. The Board dismissed the appeal as the ALJ's denial was an interlocutory order.

There was no dispute that claimant suffered a compensable injury but the parties were unable to agree upon the nature and extent of disability he suffered as a result of the accidental injury.

The ALJ awarded claimant compensation for a 10 percent permanent partial whole person functional impairment. The ALJ also noted that he had denied respondent's motion to extend its terminal date to take the deposition of Dr. Carabetta. Consequently, that deposition was not considered as part of the evidentiary record by the ALJ.

Respondent requests review of whether the ALJ erred in denying its motion to extend its terminal date and that Dr. Carabetta's deposition should be considered part of the evidentiary record. Respondent further argues that the ALJ's Award should be modified to a 5 percent permanent partial functional impairment.

Claimant argues that it is an unwarranted delay for respondent to wait until just before expiration of its terminal date before requesting an extension in order to take a deposition that had not even been scheduled. However, claimant further argues that even considering Dr. Carabetta's deposition, the more persuasive rating was provided by Dr. Koprivica and claimant has met his burden of proof to establish that he suffered a 15 percent functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Initially, the Board must address the respondent's request to include, as part of the evidentiary record, the deposition of Dr. Vito J. Carabetta taken August 29, 2008. At the regular hearing, the ALJ set claimant's terminal date for July 15, 2008, and the respondent's terminal date for August 18, 2008. On August 15, 2008, respondent filed a Motion to Extend Terminal Date requesting a 30-day extension. The claimant objected to the extension and a hearing on the motion was held on September 2, 2008.

At the motion hearing, the respondent noted that Dr. Carabetta was the treating physician and his rating was the same as the court ordered independent medical examiner so there was initially no plan to depose the doctor. But after the deposition of claimant's medical expert, Dr. Koprivica, on July 9, 2008, respondent's counsel decided to explore the possibility of deposing Dr. Carabetta to refute some testimony Dr. Koprivica had made regarding Dr. Carabetta's rating. Respondent's counsel discussed the matter with his client and ultimately decided to take Dr. Carabetta's deposition. Consequently, the motion for extension was filed. Claimant objected to the delay and the timing of the request for extension especially since the doctor's deposition had not been scheduled when the motion was filed.

In an Order dated September 3, 2008, the ALJ denied the motion and noted the deposition would not be considered. In the Award the ALJ again explained the motion was

denied due to the inordinate amount of time it took for respondent to determine it needed to take Dr. Carabetta's deposition after Dr. Koprivica's deposition had been taken.

In a workers compensation proceeding, the claimant has the burden of proof to establish the right to an award of compensation and to prove the various conditions on which the claimant's right depends.¹ The "burden of proof" is the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.² The parties stipulate to issues not in dispute and the remaining disputed issues require the presentation of evidence. All the evidence is presented to the ALJ. K.S.A. 44-523(b) provides for establishment of terminal dates for completion of the submission of evidence. The statute provides that the claimant's terminal date shall be set no later than 30 days after the regular hearing and the respondent's terminal date no later than 30 days after the claimant's terminal date. After the parties have fully submitted the evidence, the ALJ issues a decision based on the record.

An ALJ is required to set terminal dates for all parties after the first full hearing on the case. Extensions of terminal dates may be granted; if all parties agree, for certain situations where a medical evaluation of the claimant is unable to be obtained before the submission of the case, or for good cause shown.³

The respondent's request for an extension was made within its established terminal date. It is understandable that the ALJ was displeased with the extended time it took respondent to decide that it wanted to take Dr. Carabetta's deposition for rebuttal evidence after Dr. Koprivica's deposition was taken on July 9, 2008. And the only excuse offered by respondent's counsel was that it took that long to confer with the client before the decision was made. Nonetheless, the request for the extension was made before the terminal date expired and the deposition was taken well before the requested 30-day extension would have expired. Most often, it is better to err on the side of allowing the admission of evidence rather than on the side of restricting it. Whether described as rebuttal evidence or as good cause, under the circumstances, the deposition of Dr. Carabetta is admitted as part of the evidentiary record. The costs of that deposition will be assessed to respondent.

Shontay Smith injured his middle and lower back on June 28, 2006, while lifting televisions, TV carts and VCRs onto a truck. Smith reported the accident and was referred to OHS Compcare. He was diagnosed with a lumbar strain injury and released from treatment on August 18, 2006. Dr. Michael Poppa examined and evaluated claimant on

¹ K.S.A. 44-501(a).

² K.S.A. 2001 Supp. 44-508(g).

³ K.S.A. 2006 Supp. 44-523(b).

August 24, 2006. The doctor recommended an MRI scan of claimant's lumbar spine as well as work hardening. On March 8, 2007, the ALJ authorized Dr. Carabetta to treat claimant, if medically necessary.

Dr. Carabetta examined and evaluated claimant on April 23, 2007, due to low back pain. The doctor recommended an MRI scan of claimant's lumbar spine to make sure that there was no structural abnormality. A MRI scan on April 30, 2007, revealed an annular injury at L4-5 with bulging and degenerative disk disease at L3-4 and L4-5. Claimant received conservative treatment consisting of medication and physical therapy. Dr. Carabetta also recommended epidurals but the claimant declined because he feared the risk of paralyzation. Dr. Carabetta released claimant from treatment in July 2007. In a letter dated July 23, 2007, Dr. Carabetta used the DRE method and placed claimant in Category II of the *AMA Guides*⁴ which is equivalent to a 5 percent whole person impairment. The doctor opined claimant had reached maximum medical improvement as of July 5, 2007.

Dr. P. Brent Koprivica, board certified in emergency and occupational medicine, examined and evaluated claimant on October 23, 2007, at claimant's attorney's request. The doctor diagnosed claimant as having chronic thoracolumbar pain due to a sprain/strain injury which appears to be soft tissue and mechanical in nature. Dr. Koprivica also diagnosed claimant with an annular tear at L4-5 with disk bulging as well as chronic left sacroiliac arthralgia. Dr. Koprivica opined that the MRI showed there was evidence of injury but not a surgical problem. At the time of the evaluation, the doctor determined claimant was at maximum medical improvement. The doctor further opined that claimant's thoracolumbar strain/sprain, the annular changes at L4-5, the discogenic pain in the low back and the left sacroiliac sprain were all caused by the work-related injury.

Based on the *AMA Guides*, Dr. Koprivica rated claimant's thoracolumbar injury at 5 percent whole person impairment. The doctor also rated loss of flexion at 7 percent and loss of extension at 5 percent. These motion deficit impairments result in a 12 percent whole person impairment. Using the Combined Value Chart, claimant has sustained a 19 percent whole person impairment in the lumbosacral region with an additional 5 percent whole person impairment for the thoracolumbar region which results in a 23 percent whole person impairment which would round to a 25 percent impairment. But Dr. Koprivica further commented that the *AMA Guides* are in fact just guides and he thought 25 percent was not appropriate for claimant's condition so he lowered his rating to a 15 percent whole person functional impairment. Dr. Koprivica agreed that if he just rated claimant pursuant to the DRE method for his thoracic and lumbar spine then his rating would be a 10 percent whole person functional impairment. And Dr. Koprivica concluded claimant's injury was not limited to his lumbosacral region as rated by Drs. Luallin and Carabetta.

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

On December 18, 2007, the ALJ ordered an independent medical examination by Dr. Scott Luallin to determine claimant's whole body and functional impairment ratings based on the *AMA Guides* as well as any preexisting impairment before June 28, 2006. Dr. Luallin performed a physical examination and diagnosed claimant as having a lumbar strain injury with some underlying degenerative disk disease. At the time of Dr. Luallin's evaluation, he rated claimant's whole body impairment at 5 percent and determined there was no preexisting impairment to claimant's lower back.

As previously noted, Dr. Carabetta provided claimant conservative treatment and agreed that he had seen claimant on three occasions. And after he released the claimant from further treatment in July 2007 he was asked and provided a rating. Based on the *AMA Guides*, DRE Lumbosacral Category II, Dr. Carabetta rated claimant's whole person functional impairment at 5 percent. When his deposition was taken, the doctor opined that claimant's symptomatology was significantly greater than objective findings would suggest. And although claimant had complaints in his thoracic spine the doctor did not believe that there was any basis to provide a rating to that area. But Dr. Carabetta agreed that claimant complained of pain in the thoracic spine. He testified:

Q. Now, in the areas where you have marked where the pain was localized, it would be fair to state that the notations would include the lumbar and thoracic spine. Fair statement?

A. As far as the pain that he experiences on a steady state, where I have drawn it, the last couple of vertebra, perhaps 10th and -- through 12 of the thoracic spine, that area would be encompassed as well as down to the low back.

Q. Just so it's not confusing for me or the judge, according to the pain diagram that you made the notations on, based on Mr. Smith's complaints, the pain is included in the thoracic and lumbar spine; correct?

A. That is correct. He's getting probably the last two or three out of a dozen.⁵

Dr. Carabetta did not rate the thoracic spine because claimant only had complaints in the lower two segments. And he agreed that his rating would double if he rated the thoracic spine.

The sole issue is the extent of claimant's functional impairment. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides to the Evaluation of Permanent Impairment*, if the

⁵ Carabetta Depo. at 37.

impairment is contained therein.⁶ The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁷ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁸

The ALJ analyzed the evidence and concluded that claimant permanently injured not only his lumbar but also thoracic spine. Consequently, the ALJ adopted Dr. Luallin's 5 percent rating to the lumbosacral spine and Dr. Koprivica's 5 percent rating to the thoracic spine to arrive at a 10 percent permanent partial whole person functional impairment. Dr. Carabetta did not rate the thoracic spine but agreed claimant had consistent complaints in that area. Stated another way, if all the doctors had used the DRE Category method to rate claimant each doctor would have concluded claimant had a 5 percent whole person permanent partial functional impairment for the lumbosacral spine. Dr. Koprivica also rated claimant's thoracic spine at 5 percent. The ALJ noted that claimant expressed consistent complaints of thoracic pain and had met his burden of proof to establish he suffered a permanent impairment in that portion of his spine. And Dr. Carabetta agreed claimant consistently complained of thoracic pain. Based upon a review of the entire record, the Board finds claimant has met his burden of proof to establish he is entitled to compensation for a 10 percent permanent partial whole person functional impairment based upon a 5 percent rating for the lumbosacral spine and a 5 percent rating for the thoracic spine.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant for appropriate approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Steven J. Howard dated December 17, 2008, is modified to include as part of the evidentiary record, the deposition of Dr. Vito J. Carabetta taken August 29, 2008, and further modified to reflect claimant is entitled to permanent partial disability compensation for a 10 percent whole person permanent partial functional impairment.

⁶ K.S.A. 44-510e(a).

⁷ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁸ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

IT IS SO ORDERED.

Dated this _____ day of June 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent
Steven J. Howard, Administrative Law Judge